IN

THE

SUPREME COURT OF THE UNITED STATES

October Term, 1931 No. 1357

[redacted],

Appellant,

vs.

[redacted], Commissioner of Motor Vehicles,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

[redacted]

[redacted]

Attorney for Appellant.

# INDEX


| | Page |
|---|---|
| Statement as to Jurisdiction | 2 |
| Opinion below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Statement of the Case | 4 |
| The Questions Presented are Substantial | 5 |
| A. The Constitutional Question | 5 |
| B. Whether the Federal Question was decided below is itself a Federal Question for which this Court should note jurisdiction | 7 |
| Conclusion | 10 |


## CITATIONS


| | |
|---|---|
| Abie State Bank v. Bryan, 282 U.S. 755, 51 S. Ct. 252, 75 L. ed 690 (1931) | 3, 7 |
| Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S. Ct. 485, 73 L. ed. 931 (1928) | 6 |
| Appleby v. New York, 271 U.S. 364, 46 S. Ct. 581, 70 L. ed 1009 (1925) | 3, 6, 7 |

Page

Chicago, Burlington & Q, Ry. Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341 50 L. ed. 596 (1903) ..... 5,6

Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 33 S. Ct. 605, 57 L. ed. 982 (1913) .... 6

Demorest v. City Bank Co., 321 U.S. 36, 64 S. Ct. 384, 88 L. ed 526 (1944) ..... 6

Griffith v. Connecticut, 218 U.S. 563, 31 S. Ct. 132, 54 L. ed 1151 (1910)..... 6

Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965) ..... 7

Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 19 S. Ct. 553, 43 L. ed 823 (1898)..... 6

Lehon v. City of Atlanta, 242 U.S. 53, 37 S. Ct. 70, 61 L. Ed 145 (1916) ..... 3,6

Lovell v. Griffin, 303 U.S. 444, 58 S. Ct 666, 82 L. ed 949 (1937) ..... 3,7

N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. ed. 2d 1488 (1958) ..... 10

Page

Offield v. New York, N.H. & H.R. Co.,
203 U.S. 372, 27 S. Ct. 72, 51 L. ed
231 (1903) ..... 3,6

State v. Redmon,
134 Wis. 89, 114 N.W. 451 (1907) ..... 8,10

Staub v. City of Baxley,
78 S. Ct. 277, 355 U.S. 313 2 L.ed 2d
302 (1958) ..... 3

Southwestern Bell Tel. Co. v. Oklahoma,
303 U.S. 206, 58 S. Ct. 528, 82 L. ed.
751 (1938) ..... 7

Titus v. Wallick,
306 U. S. 282, 59 S. Ct. 557, 83 L. ed
653 (1939) ..... 3,10

Ward v. Love County,
253 U.S. 17, 40 S. Ct. 419, 64 L. ed.
751 (1920) ..... 3

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1968 No.

JAMES BISENIUS,

Appellant,

vs.

JAMES KARNS, Commissioner of Motor Vehicles

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

## STATEMENT AS TO JURISDICTION

Appeal from the Supreme Court of the State of Wisconsin, ____Wis 2d___, 165 N.W. 2d 377 (1969). The decision of the Circuit Court of Dane County of May 14, 1968 is unreported and is appended hereto.

## STATEMENT AS TO JURISDICTION

The Appellant pursuant to Rules 13(2) and 15 of the United States Supreme Court files this, his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order and decision in question, and should exercise such jurisdiction.

## OPINION BELOW

The circuit court delivered a written opinion and made findings of fact and conclusions of law which are included in the appendix. The decision of the Wisconsin Supreme Court is also included in the appendix.

## JURISDICTION

The appeal herein is from a final decree made and entered by the Supreme Court on the day of its decision, Mar. 7, 1969, in a suit for a declaratory judgment to render sec. 347.485 (1) (a) of the Wisconsin Statutes unconstitutional as violative of federally protected rights of plaintiff secured by the due process clause of the 14th amendment of the Federal Constitution. Notice of appeal was filed in the Supreme Court of the State of Wisconsin on April 16, 1969, due service of the same having been made on the Attorney General of the State of Wisconsin on April 9, 1969. The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by provisions of 28 U.S.C. 1257(2).

The following decisions are believed to sustain the Jurisdiction of the Supreme Court to review the

judgment on direct appeal in this case:

Appleby v. N.Y., 271 U.S. 364, 46 S.Ct. 581, 70 L.ed. 1009 (1925).
Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.ed. 949 (1937).
Ward v. Love County, 253 U.S. 17, 40 S.Ct. 419, 64 L.ed. 751 (1920).
Lehon v. City of Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.ed. 145 (1916).
Offield v. N.Y.N.H.&H.R.Co., 203 U.S. 372, 27 S.Ct. 72, 51 L.ed. 231 (1903).
Abie State Bank v. Bryan, 282 U.S. 755, 51 S.Ct. 252, 75 L.ed. 690 (1931).
Staub v. City of Baxley, 78 S.Ct. 277, 355 U.S. 313, 2 L.ed. 2d 302 (1958).
Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.ed. 653 (1939).

The Wisconsin Statute involved is the Motorcycle Helmet law, effective July 1, 1968 sec. 347.485(1)(a) of the Wisconsin Statutes, vol. 2, p. 3900 (1967):

347.485 - Protective Headgear for Motorcyclists -

"(1)(a) No person shall operate or ride upon a motor driven cycle on any highway unless such person is wearing protective headgear of a type and in the manner approved by the commissioner."

The decision of the State Supreme Court as involves other statutes whose constitutionality was questioned below, is not being appealed.

## QUESTIONS PRESENTED

The questions presented on this appeal are:

a. Is sec. 347.485(1) (a) such a restriction upon individual liberty as to violate the rights of appellant under the due process clause of the 14th amendment to the Federal Constitution?

b. Does sec. 347.485(1) (a) exceed the limits of the police power of the state and thereby infringe upon the rights of appellant protected from state action by the due process clause of the 14th amendment to the Federal Constitution?

## STATEMENT OF THE CASE

Appellant is the owner and operator of a motorcycle and lives in the County of Milwaukee, State of Wisconsin. On July 1, 1968 Sec. 347.485(1) (a) of the Wisconsin Statutes, Vol 2, went into effect requiring appellant and all other operators of motorcycles to wear protective headgear while operating motorcycles on the public highways of Wisconsin. Prior to July 1, 1968 appellant filed a declaratory Judgment suit challenging the constitutionality of 347.485 and other statutes. In the second amended complaint filed by appellant in the Circuit Court of Dane County (R. 110-112, A-Ap. p. 116) plaintiff alleged by pleading that sec. 347.485(1) (a) of the Wisconsin Statutes, Vol 2, laws of 1967 and other statutes were invalid as violative of Federally protected Constitutional Rights under the 14th amendment, (paragraphs 3a and 4) as vague, and violative of the rights protected from state action under the due process and equal protection clauses. The Circuit Court heard the case on May 13, 1968 and in a written decision dated June 12, 1968 ruled that the statutes, including 347.485(1) (a)

did not violate the equal protection and due process clauses of the 14th amendment as appellant alleged. (R. 101-106, A-Ap.pp. 107-116).

On Appeal to the Wisconsin Supreme Court appellant asserted that the statutes in question violated rights of appellant protected from infringment by state action by the due process clause of the 14th amendment and that as such, the statutes were outside the scope of the police power of the state. Appellant did not assert equal protection invalidity in the Wisconsin Supreme Court. (R. 134, A-Ap. pp. 134-135). The Supreme Court of the State of Wisconsin in its decision and judgment of Mar. 7, 1969 ruled that 347.485(1) (a) was valid (R. 141-144, A-Ap.pp. 143-147). The decision of the Wisconsin Supreme Court became a final Judgment of that Court on Mar. 7, 1969.

## THE FEDERAL QUESTION IS SUBSTANTIAL

### A. The Constitutional Question-

Plaintiff asserted his ground of 14th amendment invalidity before both the Circuit Court (R. 101-106) and Supreme Court (R. 142, 154-155). When such a claim of a federal right is thus set up from the outset, (especially in a declaratory judgment suit) it is deemed to dominate every part of the case. Thereafter a failure to recognize such Federal right with the decision of the state court on some ground of general or local law has the same effect as if the claim of Federal Right were denied,' and this is sufficient for the United States Supreme Court to note jurisdiction. Chicago, Burlington & Q.R. Co. v. Illinois, 200 U.S. 561, , 26 S.Ct., 341, 50 L.ed. 596 (1903). When

such a claim of right is denied by the State court of last resort, either implicitly as in Chicago etc., supra, or explicitly as in Demorest v. City Bank Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.ed. 526 (1944), Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 19 S.Ct. 553, 43 L.ed. 823 (1898), Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S.Ct. 485, 73 L.ed. 931 (1928), jurisdiction should be noted if the question is substantial. Here, the record shows that in Wisconsin alone more than 60,000 motorcycles are licensed (R. 117, 125) and the number increasing yearly. On a nationwide basis this is much greater.

Where, in addition, the basic question underlying the challenge to the power of the state, through its police powers, to enact such a law is whether a state can compel a citizen to protect himself without transgressing due process limitations, this being an issue never before considered by the United States Supreme Court, the uniqueness of this Federal Question should invoke the jurisdiction of the Court. Griffith v. Connecticut, 218 U.S. 563, 572, 31 S.Ct. 132, 134, 54 L.ed. 1151, 1155 (1910), they obviously not being frivolous in this, a declaratory judgment suit. Offield v. N.Y.N.H. & H.R. Co, 203 U.S. 372, 27 S.Ct. 72, 51 L.ed. 231 (1903). See also Lehon v. City of Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.ed. 145 (1916) and Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co., 228 U.S. 596, 33 S.Ct. 605, 57 L.ed. 982 (1913).

The United States Supreme Court cannot enforce the guaranty of the Federal Constitution unless it gives independent consideration and judgment to the constitutional issues asserted below. Appleby

v. N.Y., 271 U.S. 364, 380, 46 S.Ct., 581, 70 L.ed. 1009 (1925).

B. Whether the Federal Question was decided below is in itself a Federal Question for which the Court should note Jurisdiction.

When a state statute is challenged as violating federally protected constitutional rights, especially in a declaratory judgment suit where the prayer for relief is the voiding of the law, the deciding of the Federal question is a necessity to the determination of the cause and the judgment which was rendered, could not have been given without a decision of the Federal Question. Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206, 58 S.Ct. 528, 82 L.ed. 751 (1938). Here appellant asserts that the Court below, not expressing the rulings of the Supreme Court of the United States, decided the issues on the basis of general legal concepts and theory rather than on Federally enunciated constitutional guidelines as were made in Griswold v. Connecticut, (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.ed. 2d 510, a most recent pronouncement of the United States Supreme Court in this area. Whether or not such Federal Question was decided or not, by the Supreme Court of the state is in itself a Federal Question for which this court should note jurisdiction. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.ed. 949 (1937). The most that can possibly be said in favor of the supposed proposition that the State Supreme Court did decide or did not decide the Federal Question is that the Federal Question was so interwoven with other non-federal grounds of decision as to be inextricable. In such instance, the United States Supreme Court notes jurisdiction. Abie State Bank v. Bryan, 282 U.S. 765, 51 S.Ct. 252, 75 L.ed. 690 (1931).

Furthermore, Appellant notes that the State Supreme Court did not follow, as did the Circuit Court, Wisconsin case law criteria in deciding the constitutional issues, thus inferring that the grounds of denial of the right in the State Court were Federal in their scope and nature, or that the court attempted to evade established state law to set up a non federal ground of denial of the right. The Wisconsin law is encapsuled in a line of decision springing from the early landmark case of State v. Redmon, 134 Wis. 89, 114 N.W. 451 (1907), which the trial court relied on in deciding the constitutional questions presented. In Redmon the Wisconsin law was thus stated (p. 101):

> "A legislative enactment approved by the executive and duly published is not necessarily a law binding on any one in respect to his liberty, his business or his property. It is such if it is susceptible of passing the judicial test of whether it is warranted by the fundamental law which our constitutional system contemplates may be applied to all such enactments. Perhaps the thought sometimes expressed that the vital feature suggested which every good law must possess is not fully appreciated by the law making power, as it ought to be, leading to the infractions of some express limitation as well as that broad general restriction of legislative power contained in the declaration that:
>
> > "...all men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness..."
>
> Too much dignity cannot well be given to that declaration. That it was intended to cover a

broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted. This court has given thereto its proper place in unmistakable language, particularly in recent decisions... (cite)... Doubtless the fathers of the constitution foresaw the likelihood and danger of the security of personal rights which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and with that in view incorporated in the fundamental law at Sec. 22, Art. I that admonition so full of meaning:

> "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue and by a frequent recurrence to fundamental principles." (Emphasis added)

The Court went on to say (p. 107):

> "It is a judicial function to define the proper subjects for the exercise of the police power... it must be to decide as to any enactment, whether it really relates to a legitimate subject or under the guise of doing so violates rights of persons and property... It is not every enactment which will to some extent promote the public health, comfort or convenience which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government."

The Redmon case is followed in a long line of Wisconsin decisions concerning the police power. The Supreme Court of the State however, in its decision, unlike the Circuit Court, neither relied on nor referred to Redmon or to Sec. 22, Art. I of the State Constitution or on the many cases following the same, thus not apparently following the established state law in its decision. Such a decision cannot defeat the jurisdiction of the United States Supreme Court, N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.ed. 2d 1488 (1958); Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.ed. 653 (1939), and leaves the inescapable conclusion that the decision did rest on Federal constitutional grounds.

## CONCLUSION

For the above reasons, appellant prays that jurisdiction be noted, or alternatively, certiorari granted pursuant to 28 U.S.C. 2103.

Respectfully submitted,

S.A. SCHAPIRO

Attorney for Appellant

149-162 ARGUMENT OF APPELLANT AT WISCONSIN SUPREME COURT

I.

THE AREA OF REGULATION INVOLVED IN THE STATUTES IS OUTSIDE THE SCOPE OF THE POLICE POWER.

As a concession at the outset, appellant admits that the state has the power to control and regulate highways and motor vehicles as an integral part of the police power. Appellant also admits that there is a concern over the motorcycle injury rate and further admits that the legislation concerning helmets and eye protection, although not diminishing the actual rate of accidents, will in some cases diminish the severity of the accident upon the victim, himself. However, it is the prime position of appellant that the delicate balance of the personal liberty of the citizen as opposed to the interest of the state as exercised through the police power requires that the police power be limited to regulate conduct of individuals only in respect to the harm or potential harm such conduct may or could cause to others, and that the statutes herein involved transgress that limitation by imposing restrictions on individual liberty without any corresponding benefit accruing to the general welfare that would justify such restrictions. That is to say, that highway users can be subjected to regulation only in furtherance of highway safety, Hertz Drive Urself Stations v. Siggins, 359 Pa. 25, 58 A-2d 464, 7 A.L.R. 2d 438 (1948), 7 Am. Jur. 2d, Automobiles and Highway Traffic, secs. 149-166, and that such highway safety must involve the motoring public at large and not the individual alone.

Everhardt v. City of New Orleans, (1968), 208 S. 2d 423,____La.____. The question of whether or not a legislature can require the individual to wear a seat belt when driving is closely analogous to this question. In Motor Vehicles - A Comparative Analysis of Seat Belt Legislation, 14 De Paul Law Review 152 (1964), the author noted that 23 states enacted seat belt legislation requiring installation but no state required the operator or occupant of the vehicle to wear the seat belt. This would indicate that legislatures felt that they would be overstepping the bounds of public policy and the police power if they required the wearing of the belt in addition, which wearing would be aimed at the protection of the individual only. Such a restriction of individual liberty and choice, as exemplified by a requirement that seat belts be worn, or headgear and eye protection be worn, as is herein involved, are not legitimate objects of the police power in general, or of the police power as particularly applied to the regulation of motor vehicles. 60 C. J. S., Motor Vehicles, Sec. 15, p. 127; 16 Am. Jur. 2d Constitutional Law, Secs. 307-308, p. 603-604.

Appellant believes that the Courts should uphold the concept that an individual in America is still the sole arbiter of his personal and individual preferences, when choosing the same does not in any way threaten harm to others, and that such conduct may not be prohibited by the State, except as necessary to prevent direct harm on others in society. Cutting through the mass of precedents in this area is one general principle: An individual is free to act according to his own notions of self interest and self preservation, provided that what he does has no deleterious effect upon other citizens

or upon his fellow men generally. That is precisely what is needed to uphold the reasonableness of the state regulating and restricting the conduct of individuals; namely, that such regulation or restriction is needed to preserve the public health, safety, morals or welfare. Absent this condition, substantive due process forbids regulation of individual conduct. As was stated in 16 Am. Jur. 2d, Constitutional Law, Sec. 359, p. 685:

> "The term 'liberty' as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (Emphasis added).

See also 16 Am. Jur. 2d, Constitutional Law, Sec. 287, pp. 556-560; Commonwealth v. Smith (1915) 173 S. W. 340, 163 Ky. 227; People v. Carmichael, (1967) 279 N. Y. Supp. 2d 272, 53 Misc. 2d 584.

The conduct which the above quoted authorities refer to is individual conduct, and the limitations applied to the regulation of the same involve one vital point: individual conduct may not be regulated absent some legitimate public need that the regulation helps attain, which public need must relate to the public health, welfare and safety and not the safety, health or welfare of the actor against

whom the commands of the legislation are directed. That is to say, police legislation is not to be validated out of beneficient motives on the part of the lawgiver if it relates solely to the personal conduct of the person regulated. Only when the concern of the legislature is in terms of the effect upon the public or persons other than the actor, will the curtailment of the individual's liberty be upheld. In that respect appellant submits that the realm of harm involved in the helmet and goggle statute concerns only the actor, the failure to wear such equipment not having any concern with the health, welfare or safety of anyone else. The actor, as long as harm to others is not threatened or cause, may incur whatever risks he desires free from state control, much less from the criminal penalties that the laws herein involved apply. The integrity and well being of one's body is of the exclusive concern to the individual, who exclusively may make those choices as to how he may treat his own comfort and safety.

This concept has been called, by Justice Brandeis, the "right to be left alone". In Olmstead v. U.S. (1928), 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, he said:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. The makers of the Constitution sought to protect Americans in their beliefs, their thoughts,

their emotions and their sensations. They conferred as against the government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man."

See also the concurring opinion of Justice Goldberg in Griswold v. Connecticut (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510.

Appellant contends that the delicate balance of the personal liberty of the individual as opposed to the interest of the state as exercised by its police power has been improperly and unconstitutionally imbalanced against the rights of the individual in a discriminatory and unreasonable manner, repugnant to both the letter and spirit of the due process clause of the 14th Amendment, and of the Constitution of the State of Wisconsin.

II.

EVEN IF THE AREA OF LEGISLATION WERE WITHIN THE POLICE POWER, THE METHOD OF REGULATION ADOPTED BY THE LEGISLATURE IS INVALID.

Appellant's position, secondarily, is that, even if the legislature has, within the police power, the right to control and regulate individual conduct as it relates to the well being and safety of the actor alone without corresponding effect upon others, that the method utilized in these laws constitutes an improper and unconstitutional method of regulation to the end desired. That the Supreme Court may look both to the reasonableness and constitutionality of the area of legislative control and,

separately, to the reasonableness and constitutionality of the methods adopted by the legislature to effectuate such control, is well established. Borden Co. v. McDowell, (1959), 8 Wis. 2d 246, 99 N. W. 2d 146. Thus, appellant submits, if the state can legitimately control individual safety and well being, without the behaviour having any relation to the welfare, safety and health of other citizens of society, it must do so in a method which is sanctioned by due process limitations. Towards this end, were the state desirous of reducing the highway accident rate and diminishing the severity of the accidents themselves, it must choose a constitutionally sanctioned method to accomplish these goals. This it could do by making highly stringent licensing requirements; for instance, strict laws on restriction or revocation of motorcycle operating privileges following violations or accidents, special speed limits for motorcycles, equipment requirements, passenger requirements, regulations designating special lanes for motorcycles in multi-laned highways, but not by means that will limit the freedom and liberty of the cyclist to make his personal choices in matters which do not concern the health, safety or welfare of anyone else.

## III.

## CONCLUSION

For the above reasons, appellant respectfully prays that the helmet, goggle and handlebar regulatory statutes be declared unconstitutional.

Respectfully submitted,

S. A. SCHAPIRO
Attorney for Appellant

101-110 DECISION OF TRIAL COURT
(Formal and Irrelevant Parts Omitted)

The plaintiff in this case challenges the validity of Section 64,, Chapter 292, Laws 1967 which enacted, among other things, Sections 347.485, Stats. 1967. The challenge extends to subsections (1), (2) of Sec. 347.485 relating to requiring protective headgear and eye protection, and to Sec. 347.486 requiring handlebars to be not over 15 inches above the seat. Attack is also leveled against Section 45, Chapter 292, Laws 1967 enacting Sec. 346.595 (5) requiring motorcycles to have lights while being operated.

These statutes are attacked as violating the due process and equal protection clauses, presumably of both United States and state constitutions.

It is obvious that the purpose of requiring helmets is to protect against head injuries. It is likewise obvious that the reason eye protection is not only to protect the face from damage but to prevent foreign objects from getting in the eyes to affect eyesight and ability to control the motorcycle. The purpose of the handlebar requirement is not so obvious. It is a well known fact that a vehicle with its lights on is easier to see, even in the daytime.

I. Due Process - Protective devices - helmets and eye guards.

The purpose of the helmets and eyeguards being primarily to protect the motorcycle rider, is attacked as an unreasonable interference with the

personal liberty of the individual to endanger himself. Motorcycles may be driven at high speeds, they afford no protection to the rider if he loses control or if he collides with another vehicle or object. We recognize that some cases do hold that helmets and similar safety devices designed to protect the individual against himself. Everhardt v. New Orleans, 208 So. 2d 423 (La. App.); People v. Carmichael, 278 N.Y.S. 2d 272; People v. Smallwood, 277 N.Y.S. 2d 272. These cases seem to proceed on the theory that everyone has a constitutional right to take any risks he wishes with his person and that self-destruction is not a matter of public concern.

In our modern day the state has a concern for the health and well being of each individual. The plaintiff argues that the regulation of personal conduct by use of the police power to be valid must affect the interests of the public at large, and the means used must be reasonably necessary to accomplish that purpose and not be unduly oppressive.

The inquiries to be solved in testing an enactment purporting to be for promotion of public health are these: Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles? State v. Redmon, 134 Wis. 89, 112.

There can be no question that as to the riders of motorcycles a danger does exist. We need go no further than to refer to the literature incorporated into the stipulation of the parties which is part

of the record and which includes the conclusions of the U. S. Department of Health, Education and Welfare, Public Health Service. The recognition of the existence of the problem of head and face injuries to motorcyclists and of its magnitude is recognized by every authority that has made inquiry into the subject.

The incidence of vehicle accidents and the resulting injuries and the severity of such injuries does affect the public. It affects insurance rates, the requirements of public hospital service, lost manhours of employment with resulting loss of income tax revenues, public services to the disabled, and the widows and orphans of the deceased victims, and, since so many motorcyclists are young men, disability to serve in the armed forces. 16 Am Jur 605. The recognition of public interest in traffic accidents is manifest in Sec. 1, Chapter 292, Laws 1967. The plaintiff says that the interest of the public in the social consequences of injury to any one person or class is so indirect that the interest is not a true public interest. We do not consider the position of the plaintiff to be well taken. The consequences of head injuries to individuals do directly affect the public interest. The health and safety of individuals or groups of individuals are proper concerns of the legislature. Boden v. Milwaukee, 8 Wis 2d 318.

The provisions of Sec. 347.485 are calculated to, and, from the literature appended to the parties' stipulation, does tend to minimize the danger of head and face injuries, and in case of the eye protection in addition does tend to prevent interference with lookout due to dust, insects and debris being blown into the eyes. This is particularly

true at the speeds motorcycles may be driven. The helmet is recognized by athletes, soldiers, and workmen in trades where the danger of head injuries from falling objects are a hazard, such as welders and operators of grinders, when safety glasses are required. We are of the opinion that the requirements of head and face protection are not disproportionate to the hazards to be guarded against. It is true that one of the hazards of motorcycling accidents is the incidence of severe injuries to the limbs, especially the lower limbs. But the legislature in its wisdom need not provide a complete solution to every problem in order to make a partial solution to some of the problems valid legislation. Forest Home Dodge v. Karns, 29 Wis 2d 78.

Just how one can protect himself against head and face injuries without some protective gear is not clear. On a motorcycle the rider has no protection whatever such as an automobile or truck-driver has from the construction of the vehicle. We do not see how protection can be furnished without either enclosing the vehicle or the driver and the helmet and face protection does exactly that.

The operation of vehicles on the highway is not an unlimited constitutional right. It is a privilege subject to reasonable regulations under the police power and the privilege may be withheld unless the driver complies with reasonable regulations. State v. Stehlek, 262 Wis. 642; State v. Seraphine, 266 Wis 118. We see nothing unreasonable about the requirements of head and face protection required of motorcyclists.

But the plaintiff claims that since the requirements are solely for the protection of the rider and the rider has an inherent right to take any risks he wishes. While the protection afforded is for the rider, we do not accept this as for his benefit alone. As we have pointed out ante, the riders' welfare affects others. But accepting the contention at face value, the argument that the law must affect the public at large to be valid is not sound. The same may be said of every regulation to protect employees in the trades. The state has an interest in the health and welfare of each of its citizens, no matter how reckless he may be and has the power to enact legislation to protect the reckless citizen against himself, especially if he is a member of a substantial class of persons subjected to a similar hazard. Holden v. Hardy, 169 U. S. 366, 391-392; 42 L. Ed. 780; see also N. Y. C. RR Co. v. White, 243 U.S. 188, 61 L. Ed. 667. We see no difference in substance between requiring the use of protective devices by a class of persons, motorcyclists, and the requirement that certain tradesmen use protective devices. The persons affected are single individuals, but there is a large number of them; enough to constitute a substantial class of the persons who make up the public.

In conclusion we need only quote 16 Am Jur 605; "Protection of the safety of persons being one of the principal uses of the police power of the states, measures designed to protect and further safety of the individual are proper exercises of the power."

We find no justification for the plaintiff's complaint that the requirements of Sec. 347.485 are

unreasonable or deny due process or unduly interfere with the freedom of the individual.

II. Equal Protection as Applied to Sec. 347.485.

The plaintiff attacks Sec. 347.485 as discriminating against motorcyclists, while not applying the same standards to bicycles and automobiles. The power-driven cycle is a unique machine. It is capable of moderate to high speeds by motor vehicle standards, with the hazards inherent in speeds at which the vehicle is driven. A bicycle is limited in its speed by the nature of the power which propels it. An automobile differs from a motorcycle in providing a shell surrounding the motorist. Both bicycles and automobiles can be dangerous to the riders, but the hazards of speed on the one hand and lack of an enclosure for the driver on the other hand do distinguish the motorcycle from both the bicycle and the automobile and make the hazard of operation distinguishable from both the bicycle and the automobile. Just because both the bicyclist and the motorist are subjected to hazards of head and face injuries does not mean that in order to make Sec. 347.485 valid it must apply to bicyclists and motorists. The degrees of hazard differ and therein lies the distinction. A classification is not unreasonable because it does not affect everyone who has any exposure to an evil. Forest Home Dodge v. Karns, 29 Wis. 2d 78.

The rules governing classification are: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to

each member of the class. Borgnis v. Falk Co. 147 Wis 327, 354. "The question is not whether there may be some on one side of the line whose situation is practically the same as that on the other side, but whether there is a 'distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.'" Borgnis v. Falk Co. 147 Wis 327, 356. State ex rel Boen v. Milwaukee, 33 Wis. 2d 624. We are satisfied that the tests of what is proper discrimination between the classes suggested by the plaintiff is met in this case and that there is no unlawful discrimination in Sec. 347.485.

III. Vagueness of Section 347.485.

There is no vagueness of the statute. True the statute does not specify exactly what helmets or face guards are required, but delegates this duty to the Motor Vehicle Department. No complaint is raised by plaintiff's brief on this issue. The proposed regulations of the Motor Vehicle Department submitted with the parties' stipulation indicates that the requirements will be definite and certain with standards based upon tests to be made of the various headgear. The delegation of the making of such regulations has so long been considered proper as to afford no need for citation or argument. Verbeten v. Huettl, 253 Wis. 510. We see nothing vague or indefinite about the statute. The regulations which will supplement the statute are not before us, but as proposed they are not vague or indefinite. We see no evidence presented that compliance with the statute will of necessity increase the hazard of motorcycle operation.

IV. Validity of Handlebar Statute - Section 347.486(1).

What we have previously said as to discrimination is applicable to Section 347.486(1). There is no invalid classification.

The question of reasonableness of the statute does, however, raise a doubt. The burden is upon the plaintiff to demonstrate in what respect the law is unreasonable or arbitrary. We find no reference to this subject in plaintiff's brief. The complaint suggests that the matter of height of handlebars is not a proper subject of regulation and creates a hazard.

It is obvious that proper steering apparatus is essential equipment for any motor vehicle. 7 Am Jur 2d 706. Just what is proper equipment may be debatable and if it is it is for the legislature to make the choice in the absence of a showing that the choice is unreasonable or arbitrary.

The statute was enacted to prohibit the use of the high handlebars that are sometimes seen and which appear to be clumsy and to some extent obstruct periferal vision when used by persons of ordinary height operating motorcycles. Just because in the case of riders of unusual height the high handlebars may not be inappropriate does not make the regulation invalid, especially in the absence of a showing that the extremely tall person cannot be accommodated in some other way as by longer handlebars. The objection voiced in the complaint is not to the law as it applies to one extraordinary person, but to all motorcyclists.

We are of the opinion that the plaintiff has not demonstrated that the regulation of the height of handlebars is arbitrary or unreasonable, nor is it discriminatory.

V. Headlights - Section 346.595 (5)

The statute requiring headlights of motorcycles to be lit at all times when the machine is in operation is attacked by the plaintiff "because it is arbitrary and invalid by imposing such restrictions on operators of motorcycles but not on operators of bicycles or automobiles."

Lighted headlamps do more than show the way at night. They are warnings at night and by day of the approach of a vehicle. It might very well be required of automobiles to have headlights lit in the daytime. However, by virtue of the size of automobiles alone, their presence should be obvious. A motorcycle is a small machine covered to a large degree by the rider and it is easy for the machine and rider to blend into the background and not be seen by other travelers. The statute is designed to prevent this. Anyone who has had experience in the trial of accident cases involving motorcycles with automobiles has heard the motorist in almost every case complain that he did not see the motorcycle. This is such a common complaint, even in the daytime, that it is almost universal. Here again, the bicycle is different in that it is slow-moving and hence more easily controlled by the cyclist. The automobile differs in size. So the classification is not unreasonable nor is the regulation one without a sound basis in experience, as well as reason.

VI. Conclusion

The court concludes that Sections 347.385, 347.486(1) and 346.595(5) are all valid enactments.

Therefore, it is

ORDERED: That the Attorney General will prepare the necessary findings of fact, conclusions of law and judgment declaring that Sections 347.485 (1)(2), 347.486, and 346.595(5) are valid and enforceable and dismissing the complaint, and after submitting the same to counsel for approval as to form, present them to the court for entry.

Dated May 14, 1968.

BY THE COURT:

W. L. Jackman
Judge

110-114 SECOND AMENDED COMPLAINT
(Formal and Irrelevant Parts Omitted)

COMES NOW THE PLAINTIFF by his attorney and complains as follows:

1. That plaintiff is an adult resident of Milwaukee County Wisconsin and i the owner and operator of a motorcycle.

2. That defendant is the commissioner of motor vehicles for the State of Wisconsin and is authorized by sec. 347.485 to set standards and specifications for "protective headgear" to be

worn by all motorcycle operators and passengers after July 1, 1968, pursuant to 347.385.

3. That the aforesaid statute to go into effect on July 1, 1968 is and shall require all operators and passengers of motorcycles to wear "protective headgear" and goggles or eye protection and as such is unconstitutional and void for the following reasons:

a. It is an arbitrary and invalid and improper exercise of the police power of the state by attempting to regulate and control the mode and manner of personal attire and dress, and by attempting to compel petitioner to protect his own physical well being.

b. It is arbitrary and invalid as it imposes such requirements on operators and passengers of motorcycles only but does not require operators and passengers of bicycles or automobiles to wear similar "protective" devices.

c. It is invalid and improper in that it actually increases the hazards involved in the operation of a motorcycle and is therefore void and unenforceable.

d. It is vague and indefinite as it does not apprise petitioner of what the specifications for headgear so required are, or where such information is to be obtained or issued.

4. That the operation of the said statutes in attempting to require plaintiff and all other operators and passengers of motorcycles to use and wear such devices constitutes a substantial interference with the freedom of plaintiff and with the safety of plaintiff and in the same respects with all other operators and passengers of motorcycles, and thus threatens them with irreparable injury.

* * *

WHEREFORE for the first cause of action plaintiff demands judgment that the said statutes be declared unconstitutional and that the commissioner be permanently enjoined from setting standards and specifications for such headgear and enforcing same.

WHEREFORE for the second cause of action plaintiff demands judgment declaring sec. 347.486(1) unconstitutional.

WHEREFORE for the third cause of action plaintiff demands judgment declaring sec. 346.595(5) unconstitutional.

S. A. SCHAPIRO
ATTORNEY FOR PLAINTIFF

114-116 ANSWER TO SECOND AMENDED COMPLAINT
(Formal and Irrelevant Parts Omitted)

Now comes the defendant, James L. Karns, by his attorneys, Bronson C. La Follette, Attorney General, and Albert Harriman, Assistant Attorney General, and for answer to the first cause of action of the second amended complaint, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the second amended complaint.

2. Admits the allegations of paragraph 2 of the second amended complaint, except that defendant's official title is Administrator of the Division of Motor Vehicles of the Department of Transportation of the State of Wisconsin.

3. Denies the allegations of paragraph 3 of the second amended complaint.

4. Denies the allegations of paragraph 4 of the second amended complaint.

5. Alleges that during the last ten years, there has been a substantial increase in the number of motorcycles registered and it is estimated that this growth will continue.

6. Alleges that the number of motorcycle accidents is also increasing substantially and the number of deaths from motorcycle accidents is increasing. Half of such accidents involve head injuries and such injuries are most frequently involved in fatal motorcycle accidents.

7. Alleges that safety helmets have been found to be the most effective devices presently available for reducing the severity of injury to motorcyclists and many states now require their use. Goggles and face shields are effective devices to protect motorcyclists from face and eye injuries.

8. Alleges that many studies have been made, both in this country and abroad, of the growth of motorcycling, the increased number of accidents, the severity of injuries, and the effect of protective

head gear in reducing the severity of injuries. Such studies, based upon experience, both before and after the enactment of a mandatory helmet law, have concluded that when a helmet is worn, the risk of fatality to a motorcyclist in an accident is greatly reduced.

Answering the second cause of action of the second amended complaint, the defendant admits, denies and alleges as follows:

9. Admits the allegations of paragraph 5 of the second amended complaint.

10. Denies the allegations of paragraph 6 of the second amended complaint.

11. Denies the allegations of paragraph 7 of the second amended complaint.

12. Alleges that handlebars, higher than 15 inches above the seat of a motorcycle, tend to reduce and interfere with the effectiveness of the control which the operator can exercise over such vehicle.

Answering the third cause of action of the second amended complaint, the defendant admits, denies and alleges as follows:

13. Admits the allegations of paragraph 8 of the second amended complaint.

14. Denies the allegations of paragraph 9 of the second amended complaint.

15. Alleges that motorcycles are small motor vehicles and difficult for automobile drivers to

see. Such vehicles are also high powered in relation to their weight and highly maneuverable. The lighted head lamp brings their presence more readily to the attention of other drivers.

WHEREFORE, defendant prays that the Court enter judgment declaring secs. 346.595 (5), 347.385, 347.486 (1), Stats., 1967, valid and constitutional in every respect.

Dated at Madison, Wisconsin, this 5th day of April, 1968.

BRONSON C. LA FOLLETTE
Attorney General

/s/ Albert Harriman
ALBERT HARRIMAN
Assistant Attorney General
Attorneys for Defendant,
James L. Karns

117-122 STIPULATION
(Formal and Irrelevant Parts Omitted)

The parties hereto, desiring an early resolution of the controversy here involved, and desiring to limit the issues and present the facts to the Court without taking formal testimony so far as possible;

IT IS HEREBY STIPULATED between the parties hereto, by their respective counsel, as follows:

1. The use of motorcycles is becoming increasingly popular. The number of motorcycle

registrations has been increasing substantially in this country each year since 1955. For example, in Wisconsin, motorcycle registrations were as follows from 1961 through 1967:

| Year | Motorcycles Registered |
|---|---|
| 1961 | 12,979 |
| 1962 | 13,582 |
| 1963 | 15,903 |
| 1964 | 19,576 |
| 1965 | 33,236 |
| 1966 | 48,649 |
| 1967 | 60,369 |

Such increase in the number of motorcycles has been accompanied by an increase in motorcycle accidents, and injuries and deaths therefrom.

2. Many studies of the growing popularity and use of motorcycles and the growth and severity of motorcycle accidents have been undertaken. See the following studies which are attached hereto and incorporated herein by reference:

Special Problems of the Motorcycle Boom, by Richard C. Dillihunt

A Concise Study of 259 Motorcycle Crashes investigated by the State Police in Rural Virginia Areas

Australian Study

Experience in New Zealand

British Medical Journal, October 4, 1941

British Medical Journal, May 15, 1943

Canadian Study

Effectiveness of Present Day Crash Helmets for Motorcyclist, by Chandler and Thompson

3. The U. S. Department of Health, Education and Welfare has published a booklet titled "Motorcycles in the United States", which is attached hereto and incorporated herein by reference.

4. The result of these and other studies has been that the U. S. Department of Transportation has promulgated standards for motorcycle safety which the states are required to meet. Such federal standards are attached hereto and incorporated herein by reference.

5. In response to this federal standard, the Wisconsin Legislature adopted the new motorcycle safety code which is the subject of this litigation. Some 24 other states adopted similar laws. Attached hereto and incorporated herein by reference are the standards and specifications for protective head gear proposed for adoption by the Administrator of the Division of Motor Vehicles, as rules MVD 18.01 - 18.16.

6. Many other articles have been written on motorcycle safety. See the following, which are attached hereto and incorporated herein by reference:

What Price Safety, appearing in the April, 1967 issue of Cycle Guide Magazine, pp. 10-13.

Death Rides on Two Wheels, condensed from Contemporary Magazine.

Those Wild, Wild Wheels, appearing at pp. 4-5 in This Week Magazine for March 31, 1968, published by the Milwaukee Journal.

7. Articles on the availability of protective helmets and eye protection devices, and helmet research are the following, which are attached hereto and incorporated herein by reference:

Buco Accessories Catalog, 1967.

Helmet Guide, appearing in the April, 1967 issue of Cycle Guide Magazine, pp. 14-20.

Safety Helmet Research.

8. Protective helmets for motorcycle riders come in a variety of styles and shapes. With some helmets, the hard protective covering extends over the ears. Some riders find that this considerably reduces their ability to hear traffic and other noises. Other riders find that their hearing is only slightly reduced by such helmets. These helmets also reduce slightly the vision of the rider to each side. However, the proposed rules of the Division of Motor Vehicles provide that the helmet shall be designed to permit vision of 120 degrees from straight ahead to each side.

9. There are also protective helmets which do not have the hard protective material extending over the ear. These are held in place by straps which have ear holes which permit the rider to hear better and which do not interfere with vision to the side. Such helmets are permitted by the proposed rules of the Division of Motor Vehicles.

10. Helmets can cause some tiring and discomfort in hot weather. Some riders object to this. Other riders do not find this a problem.

11. Some motorcycle riders feel that handlebars higher than 15 inches above the seat, increase safety of operation for tall riders. They also claim that handlebars, lower than 15 inches above the seat, require the tall rider to assume an awkward position which affects his balance. Other motorcycle riders deny this and claim that handlebars can be swept back instead of raised to suit the comfort and safety of tall riders.

12. There is a difference of opinion among motorcycle riders as to the need for eye protection. Some feel the eyes do not need protection from wind, dust, sand, gravel, and insects. Others feel that such protection is necessary because motorcyclists are struck by such objects. Goggles made of nonshatter proof glass could cause injury to the eyes if broken by an impact. There are many goggles and face shields on the market which are made of shatter resistent plastic polyethylene. These offer little danger to the eyes, and protect the eyes and face from impact with wind, dust, sand, gravel and insects.

13. Goggles and face shields can cloud up with

moisture in cold weather and reduce vision. Where this happens, it may become necessary to remove them and let them air out or wipe them clear.

14. Some motorcycles have batteries and generators of insufficient capacity to tolerate constant use of headlights during daylight hours. Such motorcycles are designed to run without lighted headlights during daylight hours so that the generator will have sufficient time to recharge the battery for nighttime running with lights on. This necessitates replacement of batteries or larger generators.

Dated this_____day of April, 1968.

/s/ S. A. Schapiro
S. A. Schapiro
Attorney for Plaintiff

BRONSON C. LA FOLLETTE
Attorney General

/s/ Albert Harriman
Albert Harriman
Assistant Attorney General
Attorneys for Defendant

122-
123 SUPPLEMENTARY STIPULATION
(Formal and Irrelevant Parts Omitted)

It having been agreed at the pre-trial conference that paragraph 11 of the original stipulation is incomplete and should be clarified,

IT IS HEREBY FURTHER STIPULATED that said paragraph 11 be deleted and the following

statements of facts shall be substituted therefor:

1. That witnesses for the plaintiff, if called to the stand, would testify that tall motorcycle riders feel that motorcycle handlebars, higher than 15 inches above the seat, increase the safety of operation for tall riders. Handlebars, lower than 15 inches above the seat, require the tall rider to assume an awkward position which affects his balance, and thus affects the safety of the operation of the motorcycle.

2. That witnesses for the respondent, if called to the stand, would testify that motorcycle handlebars, higher than 15 inches above the seat, do not require the tall rider to assume an awkward position which adversely affects his balance and the safety of operation of the motorcycle. Handlebars can be swept back instead of raised to suit the comfort and safety of tall riders. Handlebars, higher than 15 inches above the seat, interfere with the ability of the rider to control and steer a motorcycle, especially in emergency conditions. Handlebars, less than 15 inches above the seat, provide the greatest measure of control over the motorcycle.

Dated this 6th day of May, 1968.

/s/ S. A. Schapiro
S. A. Schapiro
Attorney for Plaintiff

BRONSON C. LA FOLLETTE
Attorney General

By /s/ Albert Harriman
Albert Harriman
Assistant Attorney General

Attorneys for Defendant

123-127 FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Formal and Irrelevant Parts Omitted)

This matter having come on for hearing May 13, 1968, before the Court, and the plaintiff appearing in person and by S. A. Schapiro, his attorney, and the defendant appearing by Albert Harriman and Robert D. Martinson, Assistant Attorneys General, his attorneys, and the Court having heard and considered the argument of counsel and having rendered its decision, dated May 14, 1968, the Court makes and files its Findings of Fact and Conclusions of Law as follows:

## FINDINGS OF FACT

1. The legislature has enacted sec. 347.485 (1) (a), Stats., 1967, requiring a motorcyclist to wear protective headgear. This statute takes effect July 1, 1968.

2. The legislature has also enacted sec. 347.485 (2), Stats., 1967, which requires motorcyclists to wear eye protection; sec. 347.486 (1), Stats., 1967, which requires that motorcycle handlebars may not rise more than 15 inches above the top of the driver's seat; and sec. 346.595 (5), Stats., 1967, which requires motorcycle headlamps to be lighted whenever the cycle is in operation. These statutes took effect January 11, 1968.

3. The use of motorcycles is becoming increasingly popular. The number of motorcycle registrations has been increasing substantially in this country each year since 1955. For example, in Wisconsin, motorcycle registrations were as

follows from 1961 through 1967:

| Year | Motorcycles Registered |
|---|---|
| 1961 | 12,979 |
| 1962 | 13,582 |
| 1963 | 15,903 |
| 1964 | 19,576 |
| 1965 | 33,236 |
| 1966 | 48,649 |
| 1967 | 60,369 |

Such increase in the number of motorcycles has been accompanied by an increase in motorcycle accidents, and injuries and deaths therefrom.

4. Many studies have been made of the growing popularity and use of motorcycles, the growth and severity of motorcycle accidents, and the value of helmets in reducing head injuries, as follows:

Special Problems of the Motorcycle Boom, by Richard C. Dillihunt

A Concise Study of 259 Motorcycle Crashes investigated by the State Police in Rural Virginia Areas

Australian Study

Experience in New Zealand

British Medical Journal, October 4, 1941

British Medical Journal, May 15, 1943

Canadian Study

Effectiveness of Present Day Crash Helmets for Motorcyclist, by Chandler and Thompson

5. A study in Australia compared motorcycle accident experience both before and after the enactment of a mandatory helmet law and concluded that the risk of fatality to a motorcyclist in an accident is reduced by wearing a helmet to about one-third of the risk without a helmet.

6. The U. S. Department of Health, Education and Welfare has published a booklet titled, "Motorcycles in the United States" which concludes:

(a) The head is most frequently involved in fatal motorcycle injuries.

(b) A serious factor contributing to death and injury in motorcycle accidents is that many riders do not wear protective clothing, such as helmets and goggles.

(c) Safety helmets are the most effective devices presently available for reducing the severity of injury to motorcyclists.

7. Motorcyclists face serious danger of head and face injuries. The statutory requirements of helmet and eye protection tend to minimize this danger. Also, eye protection tends to prevent interference with lookout due to dust, insects, and debris being blown into the eyes.

8. The incidence of motor vehicle accidents

and the resulting injuries and the severity of such injuries also affect the public generally in respect to insurance rates, the requirements of public hospital service, lost man-hours of employment with resulting loss of income tax revenues, public welfare services to the disabled, and in respect to the support of the widows and orphans of deceased victims of such accidents, and further, since so many motorcyclists are young men, in respect to disability to serve in the Armed Forces.

9. The plaintiff has not met his burden of proof to establish beyond a reasonable doubt that the regulation of the height of motorcycle handlebars is arbitrary, unreasonable, and discriminatory and therefore unconstitutional.

10. A motorcycle is a small vehicle and difficult for other motorists to see. The lighted motorcycle headlight makes such vehicle easier to see, even in the daytime.

127-128

## CONCLUSIONS OF LAW

1. Secs. 347.485 (1) (a) and (2), Stats., 1967, requiring motorcyclists to wear helmets and eye protection, are a reasonable and proper exercise of the police power, and are not discriminatory, nor vague and indefinite, and are constitutional and valid legislative enactments.

2. Sec. 347.486 (1), Stats., 1967, requiring that motorcycle handlebars may not rise higher than 15 inches above the top of the driver's seat, is a reasonable and proper exercise of the police power, and is not discriminatory, nor vague and indefinite, and is a constitutional and valid legislative enactment.

3. Sec. 346.595 (5), Stats., 1967, requiring motorcycle headlights to be turned on whenever the motorcycle is in operation, even in the daytime, is not discriminatory, and is a constitutional and valid legislative enactment.

4. Judgment should be entered declaring said statutes constitutional and valid in all respects.

Let judgment be entered accordingly.

Dated this 12th day of June, 1968.

BY THE COURT:

/s/ W. L. Jackman
Circuit Judge

132-144 DECISION OF WISCONSIN SUPREME COURT
(Formal Parts Omitted)

APPEAL from a judgment of the circuit court for Dane County: W. L. JACKMAN, Circuit Judge. AFFIRMED.

## FACTS

This is an action for declaratory judgment initiated by plaintiff, a motorcyclist, challenging the validity of certain statutes relating to operation of motorcycles in this state. From a judgment holding such statutes to be a valid and constitutional exercise of the police power of the state, plaintiff appeals.

ROBERT W. HANSEN, J. Under attack are the three Wisconsin statutes that require motorcycle

operators to (1) wear protection for their eyes; [1] (2) equip their motorcycles with handlebars that rise no more than 15 inches above the driver's seat; [2] (3) wear protective headgear. [3]

THE PUBLIC POLICY

We do not deal here with the wisdom or lack of wisdom of these three legislative enactments. The legislative history of these laws, in this state and others, demonstrates that they have dedicated proponents and equally dedicated opponents. The

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1/ "Sec. 347.485 (2) No person shall operate a motor-driven cycle on any highway unless such person is wearing eye protection as follows: (a) protective face shield attached to the headgear, or (b) glasses or (c) goggles. If the vehicle is equipped with a windshield which rises a minimum of 15 inches above the handlebar, the use of other eye protective devices is not mandatory. This subsection shall not apply to persons operating a motor-driven cycle in a parade sanctioned by the local municipality."

2/ "Sec. 347.486 (1) It is illegal to operate a motor-driven cycle where the handlebars rise more than 15 inches above the lowest point of top of the driver's seat when the seat is occupied."

3/ "Sec. 347.485 (1) (a) No person shall operate or ride upon a motor-driven cycle on any highway unless such person is wearing protective headgear of a type and in the manner approved by the commissioner."

question before us is not what a legislature should do, but what the legislature can do. As has been said:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation..." 4/

In reviewing statutes such as these, we begin with a strong presumption of their validity. 5/ We are not to sit in judgment on the merits of such legislation. If the statutes here challenged do not contravene significant constitutional or inherent rights of individuals, if the classification on which they are based is reasonable, if they are within the scope of the police powers of the state, if they are appropriately related to a proper purpose of such police power, the three statutes are not to be invalidated by the judicial arm of government. Indeed, the laws are to be upheld by the courts if it is at all possible so to do.

THE TWO ISSUES

This is no shotgun blast type of attack, raising all possible challenges. No issue is raised as to the

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4/ Berman v. Parker (1954), 348 U.S. 26, 32, 75 Sup. Ct. 98, 99 L. Ed. 27.

5/ Gottlieb v. Milwaukee (1967), 33 Wis. 2d 408, 410, 147 N.W. 2d 633.

police power right of the state to control highway safety. 6/ No challenge is made to the right to regulate motor-driven cycles as a separate class of vehicles. 7/ The relatedness of the legislative enactments appears to be conceded in diminishing the serious consequences, but not in decreasing the incidence of highway accidents involving motorcycle drivers. 8/ Two basic challenges are made to the validity of the three laws involved: (1) That they protect the motorcycle driver or rider only against himself, and are, therefore, outside the scope of the police power authority of the state; and (2) That they transgress constitutional or inherent rights of the plaintiff without corresponding benefit accruing to the general welfare. Both contentions rest upon the appellant's interpretation of the three statutes as doing no more than protecting cycle drivers and riders from the consequences of their own actions.

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6/ "As a concession at the outset, appellant admits that the state has the power to control and regulate highways and motor vehicles as an integral part of the police power." Brief of Appellant, p. 4.

7/ "Appellant also admits that there is a concern over the motorcycle injury rate..." Brief of Appellant, p. 4.

8/ "Appellant...further admits that the legislation concerning helmets and eye protection, although not dimishing the actual rate of accidents, will in some cases diminish the severity of the accident upon the victim himself." Brief of Appellant, p. 4.

PROTECTION AGAINST SELF?

Is the sole purpose, effect and result of these motorcycle safety requirements to protect the cyclists, riders or both against themselves? Can we say that they concern or benefit in no way other persons, particularly other users of the public highways?

As to sec. 347.485 (1) (a), Stats., requiring operators of motor-driven cycles on any highway to wear glasses, goggles or face shield, unless the vehicle is equipped with a high enough windshield, the challenge fails. Requiring protection for the eyes is clearly related to the accident-causing possibility of dust, dirt, pebbles, even rain or snow, coming in contact with the unshielded eyes of a motorcycle driver. This safeguard against attention being distracted or vision being affected is clearly related to the concerns and interests of other users of the highway. If we were dealing with the cowboy on his horse in the days of the unfenced prairies, the answer might be different but not in an era of high speed vehicles and heavily travelled highways.

As to sec. 347.486, Stats., regulating the position of the handlebars, the relatedness of the requirement to other users of the highway is likewise evident. The prohibition of tilted or elevated handlebars which lift hands, wrists and arms skyward is related to the necessity of having a motor-driven vehicle under proper management and control. In the split-second decisions that high speed driving calls for, such full control is related to preventing accidents and to the well being of other users of the highway. Once again, in horse-and-buggy days,

how high one held the reins might not concern others. Fast driving and heavy traffic have changed all that.

As to sec. 347.485, Stats., requiring protective headgear for motorcyclists, the question is much closer. The very term, "protective headgear" implies protection of the head of the wearer. It must be conceded that this particular statute is intended primarily to diminish the severity of the accident upon the victim, himself. But can we say that such safety requirement does not affect or concern at all other users of the public highway?

If the picture that flashes to mind is that of a solitary cyclist on a deserted country road losing control and hitting, an affirmative answer seems plausible. But not all highways are deserted these days; in fact, few are. If the loss of cyclist control were to occur on a well-travelled highway, the separation between consequence and incidence is less sharp. Anything that might cause a driver to lose control may well tragically affect another driver. If the loss of cyclist control occurs on a crowded freeway with its fast-moving traffic, the veering of a cyclist from his path of travel may pile up a half-dozen vehicles.

So, as to the helmet requirement law, one question that arises is whether the presence of a protective helmet would, in some cases and under some circumstances, make less likely the diverting of attention or loss of control of the cycle by

its driver. 9/

It cannot be disputed that the driver of a motorcycle is somewhat more exposed to flying objects than someone operating an enclosed vehicle. 10/

The wheels of vehicles travelling at high speeds can kick up or toss through the air pebbles or even stones of some size. Should such flying objects hit a cycle driver alongside the head, the possibility of distraction or even temporary loss

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9/ We do not deal, except parenthetically, with the relationship of wearing safety helmets to visibility. Nearly all safety helmets come in bright colors - yellow, red, white, etc. - that contrast with highway backgrounds. Particularly under conditions of dusk, fog or rain, this factor can make motor-driven cycles and their drivers more easily noticed by oncoming drivers of other vehicles. Such increased visibility would appear to be an accident-preventing factor that aids and concerns other users of the public highways. However, since this aspect of the case was not referred to in the briefs or arguments on appeal, we do not rely upon it here.

10/ "The operator of a motorcycle has considerably less body protection than operators of enclosed vehicles and is more susceptible to be injured and cause other injuries. Thus, there is a reasonable basis for the requirement of headgear to motorcycle drivers as opposed to such requirements for automobile drivers or golf cart operators..." Everhardt v. New Orleans (1968, La. , (Case No. 49, 257)

of control seems to us evident. [11] The possibility of bees, wasps or even hard-shelled beetles flying into the head of cycle drivers is rather remote, [12] but windblown leaves or branches hitting against the bareheaded driver might well be at least a distraction. [13] One court has termed the

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11/ "The court takes judicial notice of certain dangers inherent in the operation of motorcycles as compared to that of automobiles. The danger of flying stones or other objects from the wheels of moving vehicles is a real one. A blow on the head of a cyclist not only could endanger himself, but be the cause of injury or death to other users of the public highways. To prevent such possible occurrences is a valid objective for legislative action under the general police power of the State." People v. Schmidt (1967), 54 Misc. 2d 702, 703, 282 N.Y.S. 2d 290, 292.

12/ However, that possibility moved a New York trial court to say the following: "The old joke about the happy motorcyclist--'the one with the bugs on his teeth'--is not too funny when one hears or reads about instances where cyclists have been hit with hardshelled beetles or bees and have lost control of their bikes, causing damage and injuries to others." People v. Bielmeyer (1967), 54 Misc. 2d 466, 469, 282 N.Y.S. 2d 797, 800.

13/ "It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown tree branches, against which the operator of a closed vehicle has some protection, could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway." State ex rel. Colvin v. Lombardi (1968), R.I. 241 Atl. 2d 625.

argument justifying the helmet law because it protects against flying objects a "... strained effort to justify what is admittedly wholesome legislation." 14/ adding the suggestion that "If the purpose truly were to deflect flying objects rather than to reduce cranial injuries, a windshield requirement imposed on the manufacturer would bear a reasonable relationship to the objective..." 15/ It well might, but choosing between available alternatives in promoting highway safety is for the legislature, not for the courts. If requiring helmets is a protection against motorcycle drivers being hit and distracted by flying objects, such requirement need not be the only, or even the best way to accomplish the purpose of preventing such distraction to make it a proper exercise of the police power function.

Over and above the interest the state has in protecting other users of the highways from the danger of involvement in an accident, we further hold that other users of the highway have a definite and legitimate interest in seriousness of the consequences of accidents as well as in the frequency of such mishaps. Testimony in this record, not in dispute, establishes that a serious factor contributing to death and injury in motorcycle accidents is the absence of protective equipment such as helmets and goggles. In the record is the result of an Australian survey concluding that when a helmet is worn, the risk of fatality to a motorcyclist in an accident is reduced to about one-third of what the

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14/ American Motorcycle Association v. Davids (1968), Mich. App. , 158 N.W. 2d 72.

15/ Id. at p. 75.

risk would be without a helmet. Are these statistics of concern only to the driver or rider whose life may be lost? Of course not. Certainly all users of a highway have a legitimate concern in not being involved in an accident at all. They also have, and are entitled to have, a definite interest in how serious are the consequences, not only to themselves but to others, of any accident in which they may become involved. Promoting highway safety is not to be limited to the prevention of accidents alone. It can include efforts to reduce the serious consequences of accidents. There is a difference between a fender-bender and an accident causing permanent injuries or death -- a difference to the victim, to other drivers involved in the accident and to the community. If not, there would be no reason for requiring automobiles to be equipped with bumpers. They do not help avoid impacts, but they do cushion impacts and lessen the consequences of impact. In a comparative negligence state, with heavy responsibilities as to lookout and control placed upon all vehicle operators, the very real possibility of being held at least partially responsible for an accident gives every user an interest, on other than humanitarian concerns, in provisions that lessen the probabilities of death or disability as an outcome of a highway encounter. At least they are affected, and that is the test. Therefore, the police power of the state may be exercised to minimize the consequences of collisions and accidents as well as to decrease the number of such collisions and accidents.

OUTSIDE THE SCOPE

We have held that the helmet requirement statute does affect the interests of other users of

public highways. So we do not reach the question of whether it is invariably and inescapably fatal to a public safety statute that it seeks only to protect persons against the consequences of their own actions. However, if this were indeed the test to be used in determining the validity of a police power statute, a considerable number of statutes here and elsewhere would become suspect, including laws requiring hunters to wear brightly colored jackets, prohibiting riders upon motor driven cycles from attaching same to any other vehicle upon a highway, prohibiting persons other than employees from riding upon any part of a vehicle not designed for use of passengers, requiring boats to be equipped with life preservers, prohibiting aerial performances without a net, requiring persons to wear life preservers while riding on water skis, requiring tunnel workers to wear protective helmets and other types of industrial employees to wear protective goggles. For our purpose here, it is enough to observe that the concept that it is my neck and I have a right to risk it when and where I please has had some limitations placed upon its application.

RIGHT TO SELF-HARM?

The contention of appellant that the actor, as long as harm to others is not threatened or caused, may incur whatever risks he desires free from state control deserves closer analysis. There is an adventuresome appeal to the claim. It conjures up a picture of an outdoorsman piloting his canoe through dangerous rapids or scaling a lofty mountain peak. However, if it also conjures up a vision of a rejected suitor jumping from a building or driving over a cliff, it goes beyond the limits of constitutionally protected liberties. It is true that the

successful suicide is no longer within the reach of the law, but it does not follow that self-destruction is a legally protected right of individuals. Suicide, meaning the voluntary and intentional taking of one's own life by a sane person, was a felony at common law, as it still is in some jurisdictions. It is a "grave public wrong" 16/ as illustrated by statutes determining the criminality of aiders and abettors, persons joining in suicide pacts, and attempts to commit suicide. 17/

There is in the law no sanction for self-destruction, and certainly there is no right on the part of anyone to use public highways for risking or courting or seeking such self-destruction. Protection of the safety of all users of the highway even against the consequences of their own actions is a legitimate use of the police powers of the state. 18/

CONSTITUTIONAL QUESTION

There remains the contention that the balance of the personal liberty of the individual and the

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16/ Stiles v. Clifton Springs Sanitarium Co. (W.D.N.Y. 1947), 74 Fed. Supp. 207.

17/ See 83 C.J.S., Suicide, p. 783, sec. 2.

18/ "Protection of the safety of persons being one of the principal uses of the police power of the states, measures designed to protect and further the safety of the individual are proper exercises of the power." 16 Am. Jur., Constitutional Law, #308, p. 605.

interest of the state as exercised by its police power has been unconstitutionally imbalanced by enactment of these safety statutes.

We do not deal here with a present day equivalent of the edict of Julius Caesar in about 46 B. C. banning all wheeled vehicles from the streets of Rome during daylight hours. What is the personal liberty here involved? It can only be the right of the cyclist to mount his cycle and drive off without donning a safety or crash helmet. We do not deem this an inconsequential right. The old Sioux Indian maxim went "Judge no man until you have walked in his moccasins for three moons." To the cycling enthusiast the freedom to drive or ride his cycle, hatless or helmetless, is meaningful. There is something of an analogy in the situation when building workers and highway patrol officers were required to wear crash-type helmets as a protection against injury. The initial reaction was not uniformly favorable. Resistance to wearing a prescribed safety helmet is an understandable human reaction. Perhaps almost all of us have a secret admiration for the pint-sized guard on a major football team who, years ago, went out on the gridiron, sans helmet, to face giant-sized opponents. He might not be permitted or perhaps want to do so nowadays.

However, we are not faced with the question of whether football players, building workers, police officers or motorcycle drivers ought to be required to wear helmets. We face here the question of whether the Constitution, federal or state, prohibits the legislature from requiring protective helmets to be worn by motorcycle drivers (or eye protection and untilted handlebars insisted upon.)

It is probably true that every exercise of the police power of the state involves some measure of interference with personal liberties of citizens. It has been said that "To justify the State in ... interposing its authority in behalf of the public, it must appear, first that the interests of the public generally, ... require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 19/ It has been suggested that this leaves to the courts "... essentially a balancing test between the rights infringed and the benefits to the general welfare with the balance strongly weighed in favor of the general welfare at the start." 20/

We are uneasy with this balancing and weighing concept of the judicial role in testing the constitutionality of a police power statute. There is too much of a temptation to a putting of a judicial thumb on the scales with judges substituting their own evaluation of alternatives for that of the legislature. We would hold that, once within the area of proper exercise of police power, it is for the legislature to determine what regulations, restraints or prohibitions are reasonably required to protect the public safety and only the abrogation of a basic and substantial individual liberty would justify judicial intervention to set aside the

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19/ Lawton v. Steele (1894), 152 U.S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

20/ Note, 1969 Wis. L. Rev.

legislative enactments. 21/

Appellant's counsel argues that the basic liberty abrogated is the right of the individual to be left alone by government. This liberty was, years ago, capsulized by a great jurist, Louis Demnitz Brandeis, in these words.

> "The makers of the Constitution sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man." 22/

However, Justice Brandeis hardly intended that such right to be left alone would include the right to camp on a cloverleaf or do one's thing on an expressway. There is no place where any such right to be let alone would be less assertable than on a modern highway with cars, trucks, busses and cycles whizzing by at sixty or seventy miles an hour. When one ventures onto such a highway,

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21/ "It is for the legislature to determine the justice, wisdom, policy, necessity, or expediency of a law which is within its powers to enact, and such questions are not open to inquiry by the courts..." 16 C.J.S. Constitutional Law, pp. 775, 776, sec. 154.

22/ Olmstead v. U.S. (1928), 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944, dissenting opinion by BRANDEIS, J.

he must be expected and required to conform to public safety regulations and controls, including some that would neither have been necessary nor reasonable in the era of horse-drawn vehicles.

The concept of public safety is an evolutionary, not a fixed or static proposition. The range of permissible public action in the area of highway transportation has been enlarged, not by the courts, but by the changes that have come in the field of public and private transportation.

We conclude, in the words of the Massachusetts court (upholding a similar statute requiring "every person operating or riding a motorcycle to wear protective headgear conforming with certain minimum standards") that "It lies within the power of the Legislature to adopt reasonable measures for the promotion of safety upon public ways in the interests of motorcyclists and others who may use them... The act of the Legislature bears a real and substantial relation to the public health and general welfare and is thus a valid exercise of the police power ...'the legislation is reasonable, applies to all equally, and is directly related to highway safety.'" 23/ We agree.

By the Court: - Judgment affirmed.

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23/ Commonwealth v. Howie (1968), Mass. , 238 N.E. 2d 373. (Cert. denied Dec. 16, 1968.) U.S. , 89 Sup. Ct. 485, 21 L. Ed. 2d 464.

# INDEX TO APPENDIX


| | Rec. Page | App. Page |
|---|---|---|
| Argument of Appellant before Wisconsin Supreme Court ..... | 149-162 | 101-106 |
| Decision of Circuit Court of Dane County ..... | 101-110 | 107-116 |
| Second Amended Complaint ..... | 110-114 | 116-118 |
| Answer to Second Amended Complaint ..... | 114-116 | 118-121 |
| Stipulation ..... | 117-122 | 121-126 |
| Supplementary Stipulation ..... | 122-123 | 126-127 |
| Findings of Fact ..... | 123-127 | 128-131 |
| Conclusions of Law ..... | 127-128 | 131-132 |
| Decision of Wisconsin Supreme Court ..... | 132-144 | 132-147 |

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 1357

JAMES BISENIUS,

*Appellant,*

v.

JAMES L. KARNS, Commissioner of Motor Vehicles,

*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

## MOTION TO DISMISS APPEAL

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IN THE

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*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

## MOTION TO DISMISS APPEAL

1

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above entitled action upon the ground that the appeal does not present a substantial federal question. In support of said motion to dismiss appellee submits the following facts, reasons, and authorities as to why the questions presented are not so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

## NATURE OF ACTION

In this action appellant challenges the constitutionality of the Wisconsin motorcycle helmet law. Sec. 347.485 (1) (a), Wisconsin Statutes, reads:

> "Protective headgear for motorcyclists.
> (1) (a) No person shall operate or ride upon a motor-driven cycle on any highway unless such person is wearing protective headgear of a type and in the manner approved by the commissioner."

This statute makes mandatory the wearing of crash helmets by motorcyclists when riding motorcycles on the public highway. This law is applicable only to the use of the public highway. The helmet requirement is not applicable to off-the-highway situations such as races, hill climbs, and trail riding. Many other states have adopted similar laws. These laws have been adopted pursuant to standards promulgated by the United States Department of Transportation, which standards the states are required to meet. (A-Ap. 123)

## ARGUMENT

### I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

#### A. The Police Power May Protect A Person From His Own Recklessness.

The position of the appellant is that this law requires the individual motorcyclist to protect himself and that such requirement has no relationship to the general public welfare. It is contended that this is an unreasonable exercise of the police power in that it unduly interferes with personal liberty to take whatever risks a person thinks appropriate. It is argued that the state may not require a person to take steps to protect himself even from his own recklessness. It is the position of the appellee that the United States Supreme Court has already considered such an argument and rejected it.

In *Holden v. Hardy* (1898), 169 U. S. 366, 397, 42 L. Ed. 780, 18 S. Ct. 383, a statute limited the hours of labor in mines to eight hours a day. It was argued that this deprives a laborer of his right and freedom to contract to work longer hours if he chose. The court held it was proper to protect such a person, even against himself. The court said:

> " • • • But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or *where the public health demands that one party to the contract shall be protected against himself.* 'The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.' "(Emphasis supplied)

This language was quoted with approval in *West Coast Hotel v. Parrish* (1937), 300 U.S. 379, 393, 394, 81 L.Ed. 703, 57 S. Ct. 578, involving regulation of woman labor. In *Zucht v. King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194, it was held that an appeal (Writ of Error) will be dismissed for lack of a substantial federal question where previous decisions had settled the question involved.

Appellant's argument that he is free to take whatever risks he chooses, carried to its logical conclusion, would include the right to risk self destruction in a fatal accident. There is no such right. Suicide was a crime at common law. It is a grave public wrong. *Stiles v. Clifton Springs Sanitarium Co.* (W.D.N.Y. 1947), 74 Fed. Supp. 207; 83 C.J.S., Suicide, p. 783, sec. 2.

Further carrying appellant's argument to its logical conclusion would seem to invalidate many salutary police power regulations designed to protect the very persons required to obey the laws involved. This would include laws requiring hunters to wear brightly colored jackets, prohibiting riders on cycles from attaching the cycle to another vehicle on the highway, prohibiting persons from riding upon any part of a vehicle not designed for use of passengers, requiring boats to be equipped with life preservers, prohibiting aerial performances without a net, requiring water skiers to wear life preservers, requiring tunnel workers to wear protective helmets and other types of workers to wear protective goggles. Such laws are clearly in the public interest and constitutional under the police power.

### B. The Helmet Law, In Protecting The Rider, Protects The Public Welfare Generally.

The mandatory helmet law is not just a matter of private concern or personal liberty. The public interest and

the general public welfare is involved.

First, motorcycling is becoming increasingly popular. The number of motorcycles registered has been increasing rapidly since 1955. In 1967 in Wisconsin alone there were 60,000 such vehicles registered. (A.-Ap. 121, 122) Motorcyclists are a large and growing segment of our society. Is not a law which benefits such a large group of citizens, a substantial benefit to the public generally and to the general public welfare?

Second, highway safety is clearly a matter of great public concern, which has become a major problem today. Accident statistics show that many motorcyclists are being severely injured and that crash helmets will reduce these injuries. Is society powerless to take effective action to reduce these injuries? In Wisconsin, as in most states, the use of the public highway has been held to be a privilege and not a property right. Such privilege is subject to reasonable regulation under the police power in the interest of public safety on the highways. *State v. Stehlek* (1953) 262 Wis. 642, 56 N.W. (2d) 514. In this respect it should be noted that Wisconsin's Motorcycle Helmet Law applies only on the public highway, not on private property. Appellant's principal argument is that such law constitutes an invasion of privacy and an interference with personal liberty. In support of this argument he cites *Griswold v. Connecticut* (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. (2d) 510, which held invalid a state statute, prohibiting the use of contraceptives, as an invasion of privacy and an interference with personal liberty. Since the helmet law applies only on the public highway, it is obvious it does not invade this private sector of human life. An individual's beliefs and practices concerning contraception are personal and private matters concerning no one but the persons involved. However, there is nothing personal and private

about death and injury on the public highway. Highway safety is a very public matter and is everybody's concern.

Third, a clear benefit to the public arises from the fact that the wearing of crash helmets cuts down on the seriousness of head injuries and reduces the number of fatal injuries. This benefits both the riders and their families. The great increase in injuries due to traffic accidents is a great burden on insurance companies and is driving insurance premiums higher and higher. Where injured riders are unable to support themselves, welfare agencies are additionally burdened. Increasing injuries further burden already over crowded hospitals and emergency police and hospital facilities. Thus the public welfare is clearly affected in these respects.

Fourth, a motorcyclist wearing a crash helmet, will be less affected when struck on the head by flying stones, insects, sticks, tree branches or other objects. Such a blow on the head of a rider without a helmet could cause him to lose control of his cycle and injure other users of the highway. It is primarily on this reasoning that the Wisconsin Supreme Court sustained the constitutionality of the helmet law, in the case here on appeal to the United States Supreme Court. (A-Ap. 138-141)

Likewise, on the same basis the Supreme Courts of three other states have sustained the constitutionality of similar motorcycle helmet laws. *Commonwealth v. Howie* (1968), — Mass. — 238 N.E. (2d) 373; *State ex rel Colvin v. Lombardi* (1968) — R. I. — , 241 A. (2d) 625; *Everhardt v. New Orleans* (1968) — La. — , 217 So. (2d) 400. Also, in an as yet unreported decision, an intermediate appellate court in Connecticut has sustained such a law. *Connecticut v. Burzycki* (Jan. 17, 1969) 37 U.S. Law Week 2448. The only case contra was decided by an intermediate appellate

court in Michigan. *American Motorcycle Assn. v. Davids* (1968), (Mich. App.), 158 N.W. (2d) 72.

It is significant that in *Commonwealth v. Howie,* the Massachusetts helmet law case cited above, the United States Supreme Court denied certiorari. 89 S.Ct. 485, 21 L.Ed. (2d) 464. There would seem to be no more reason to review the Wisconsin decision than there was to review the Massachusetts decision.

## CONCLUSION

It is the conclusion of the appellee that no substantial federal question exists requiring a full consideration on the merits. Appellee therefore respectfully submits that the motion to dismiss the present appeal should be granted.

Respectfully submitted,

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JAMES BISENIUS,

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JAMES KARNS, Commissioner of Motor Vehicles

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

## BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

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IN THE

# SUPREME COURT OF THE UNITED STATES

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Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

## APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellant herein in opposition to the motion to dismiss, submits the following brief as to why the questions presented are substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

## ARGUMENT

### THE FEDERAL QUESTION IS SUBSTANTIAL

The uniqueness of a constitutional question makes a sufficiently substantial question in itself to invoke the jurisdiction of the United States Supreme Court under 28 U.S.C. 1257 (2). Griffith v. Connecticut, 218 U.S. 563, 572, 31 S. Ct. 132, 134, 54 L. ed. 1151, 1155 (1910). Where a large class of citizens are concerned the substantiality of the question obviously is greater. The novelty of the question herein is whether a state can compel a citizen to protect his own body from physical harm arising from voluntary choices that do not involve intentional self infliction, without transgressing due process limits. Such a question has never been decided by the United States Supreme Court, and cases cited by appellee involving regulation of wages and working conditions are clearly distinguishable as concerning the employer-employee relationship and enacted to prevent exploitation of one class of persons. Cases involving suicide, noted by appellee as a "grave public wrong" (p. 4 of appellee's brief) are likewise distinguishable from the instant case where the inherently innocuous act of not wearing a helmet, an act which, since the invention of the motorcycle up to the passage of this legislation, was a common and accepted act, (see Coopage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. ed. 441 (1915)) and neither "grave" nor a "public wrong". Appellant does not urge this court to sanction suicide or self destruction as appellee seems to suggest in his brief (p. 4), but merely feels that he and the hundreds of thousands of other cyclists should be left free to make these common, personal decisions in the ordinary

affairs of life that affect only themselves, thus allowing them to chart their own destiny, free of state interference, which right up to the instant case had always been recognized in Wisconsin. State v. Redmon, 134 Wis. 89, 114 N.W. 451 (1907) et seq. See also City of Mt. Vernon v. Julian, 17 N.E. 2d 52, 369 Ill 447 (1930).

Appellee urges that the highways constitute a sanctuary the entry upon which demands that the user forfeit those freedoms accruing to him elsewhere, under the guise of "highway safety". Without denying the need and existence of highway safety, appellant's position is that such does not demand any such restriction of freedom as is so urged. American Motorcycle Association v. Davids, 158 N.W. 2d 72 (1968 Mich. App.), and the yet unreported decision of the Illinois Supreme Court in Illinois v. Fries, ___Ill __ , ___ N.W. 2d___(1969) both voiding similar state laws.

The reasoning urged by the appellee that the public welfare demands such regulation carried to its logical conclusion would infer that the state may forbid smoking, regulate the hours of sleep and travel, make it a crime to disobey the advise of one's doctor, compel the wearing of heat retaining outer garments in cold weather, forbid walking on ice or other hazardous substances and regulate or restrict the hundreds of other ordinary affairs of life. There never has been constitutional sanction for such enactments no matter how beneficial they appear. As has been noted, the state cannot attain a desirable end by compulsion. Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. ed. 1042 (1923).

## CONCLUSION

It is respectfully submitted that the federal question is substantial and requires a full consideration on the merits with briefs and oral arguments.

Respectfully submitted,

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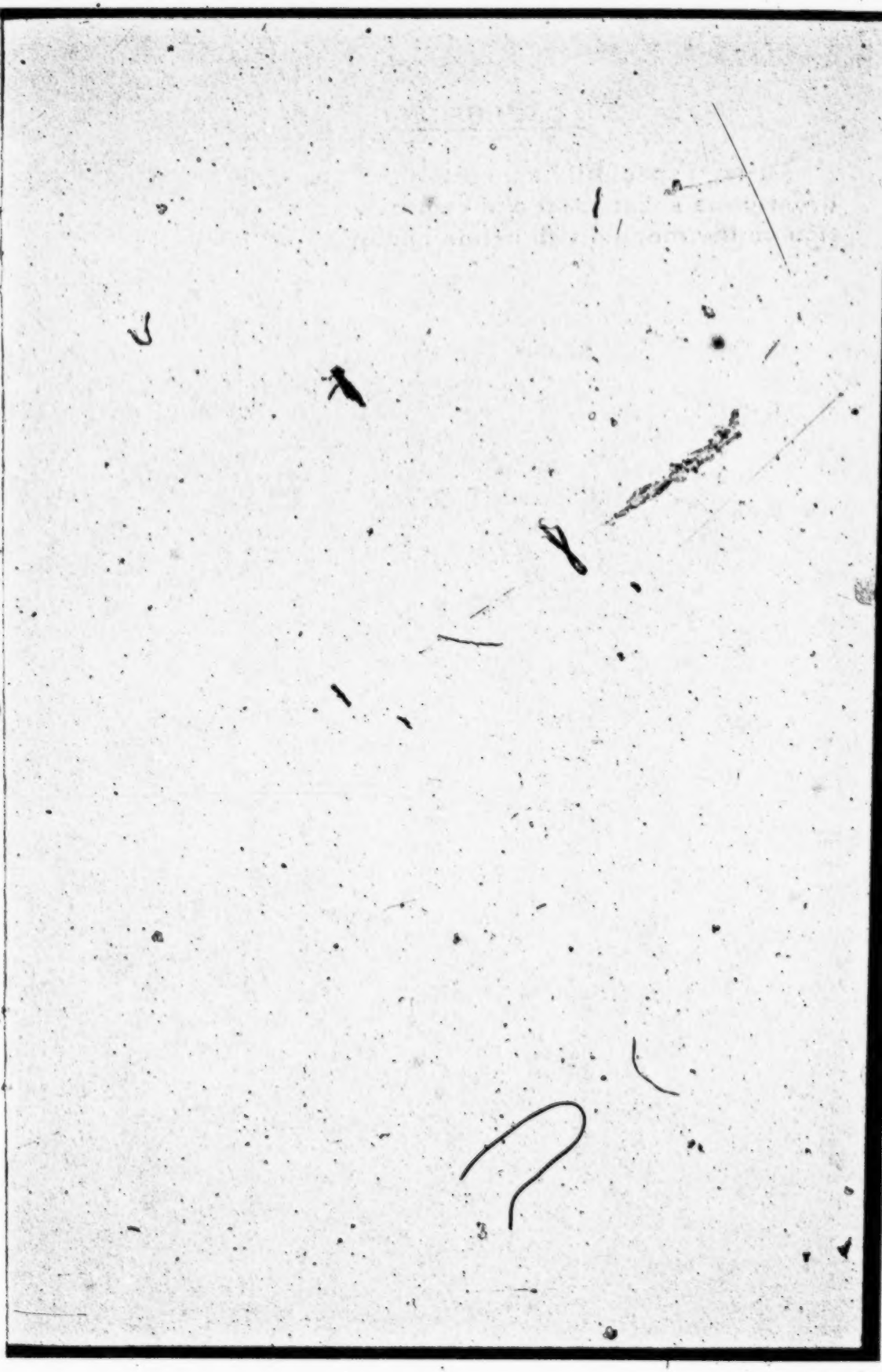

# SUPREME COURT OF THE UNITED STATES

October Term, 1968.

## BISENIUS *v.* KARNS, COMM'R OF MOTOR VEHICLES.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 1357. Decided June 16, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.